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FOR RELEASE ON DELIVERY  
8:00 p.m., Saturday, April 3, 1971The Decline -- and Possible Fall -- of  
Constitutional Democracy in America

There is no better measure of a country's belief in its own professed values than the ease or difficulty with which it betrays them. America is having an exceedingly difficult time in repudiating the ideals of Jefferson, Lincoln and Wilson in favor of the new militarism which our leaders say is our destiny and responsibility. This shows the authenticity of our attachment to democracy, but it does not guarantee democracy's survival. The outcome of the present crisis in our affairs -- whether we are to remain a constitutional democracy or degenerate into an imperial dictatorship -- is beyond our present range of vision. All that we know for certain is that, if we do give up on democracy, if we do turn our backs on the humane, rationalist values of our tradition, we will not have done it easily, or gladly -- or, most ironically, with any real knowledge of what we were doing.

I. The Jurisprudence of Crisis

Perspective is easily lost in time of crisis: you do what you think you have to do to meet a threat or seize an opportunity -- with little regard for procedure or precedent. Ends give way to means, law is subordinated to policy, in an atmosphere of urgency, real or contrived. In 1940 President Roosevelt usurped the treaty power of the Senate by his "destroyer deal" with Great Britain, and then, in 1941, he circumvented the war power of the Congress -- by engaging in an undeclared naval war on the Atlantic -- not because he wished to set himself up as a dictator but because he judged the nation to be endangered by Germany and Japan -- as indeed it was -- and he needed to act in a hurry. In 1950 President Truman committed the country, for its first time in history, to a full scale war without the benefit of Congressional authorization; he did not do that because he wished to usurp the authority of Congress but because he perceived a clear and present danger in Korea and he needed to act in a hurry. In 1964 President Johnson subverted the Congress by persuading it, on the basis of erroneous information, to adopt the Gulf of Tonkin Resolution, which he invoked later to justify his massive intervention in Vietnam. President Johnson too was in a hurry; he said that he needed an immediate and overwhelming expression of Congressional support and, to our own subsequent regret, we gave it to him.

These occurrences -- and others I could cite -- have one common attribute: the subordination of constitutional process to political expediency in an atmosphere of urgency and seeming danger, resulting in each case in an expansion of Presidential power at the expense of Congress. The fact that Roosevelt and Truman were substantially right in their assessment of the national interest in no way diminishes the banefulness of the precedents they set. FDR's deviousness in a good cause made it much easier for LBJ to practice the same kind of deviousness in a bad cause.

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The favored euphemisms for executive usurpation is "flexibility." Mr. Katzenbach, as Under Secretary of State, argued for an "essentially political approach to the conduct of our foreign affairs," leaving controversies over the division of authority between the executive and legislative branches of government to be resolved by "the instinct of the nation and its leaders for political responsibility."<sup>1</sup> If the rule of law must depend on a President's "instinct for political responsibility" -- especially when he goes into his vainglorious role as Commander-in-Chief -- then we are all about as secure as gazelles in a tiger cage; our only hope is that the tiger may not be hungry at the moment. Secretary of State Acheson pretty well summed up the "jurisprudence" of crisis when he told the Senate in 1951 that it ought not to quibble over "who has the power to do this, that, or the other thing," in this "very critical hour."

"Not only has the president the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties," /Acheson contended/, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution."<sup>2</sup>

Twenty years -- and many a critical hour -- have passed since President Truman sent the troops to Europe, and arguments about "who has the power to do this, that or the other thing" still arouse intense distaste in the executive branch of our government. It is best -- so we are still told -- to leave matters of decision making in foreign policy to be resolved according to the requirements of the moment, and who can doubt what the requirements of any given moment are going to be: the President is to be left unencumbered to make war or commitments abroad essentially as he sees fit, drawing Congress into the decision making insofar as he finds it useful and convenient. Besides, in this time of crisis -- permanent, institutionalized crisis as it has developed -- appeasing Congress would surely be interpreted as a dangerous sign of Presidential "weakness," which could only lead to further

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1. "United States Commitments to Foreign Powers," Hearings Before the Committee on Foreign Relations, U.S. Senate, 90th Cong., 1st sess., on S. Res. 151 (Washington: U.S. Government Printing Office, 1967), pp. 72-73
  2. "Assignment of Ground Forces of the United States to Duty in the European Area," Hearing by Committees on Foreign Relations and Armed Services, U.S. Senate, 82nd Cong., 1st sess., on S. Con. Res. 8, February 1-28, 1951 (Washington: U.S. Government Printing Office, 1951), pp. 92-93.

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demands for power and participation. Is this after all not the lesson of Munich? Burdened as he is with weighty responsibilities in a dangerous world, a President simply cannot afford to appear as a "pitiful, helpless giant" -- no more to the Senate than to the North Vietnamese themselves.

Only if one subscribes to the cult of the "strong" presidency which mesmerized American political science in the fifties and early sixties can one look with complacency on the growth of presidential dictatorship in foreign affairs. In those days, when the magic glow of FDR still flickered in our memories, when Eisenhower reigned with paternal benignancy, and the Kennedys appeared on white chargers with promises of Camelot, it was possible to forget the wisdom of the Founding Fathers who had taught us to mistrust power, to check it and balance it, and never to yield up the means of thwarting it. Now, after bitter experience, we are having to learn all over again that no single man or institution can ever be counted upon as a reliable or predictable repository of wisdom and benevolence; that the possession of great power can impair a man's judgment and cloud his perception of reality; and that our only protection against the misuse of power is the institutionalized interaction of a diversity of independent opinions. In this Constitutional frame of reference, a good Executive is not one who strengthens his own office by exercising his powers to the legal utmost and beyond, but one who, by respecting the limits of his own authority, contributes to the vitality of the constitutional system as a whole.

When, as in recent years, the conduct of foreign policy is thought to necessitate the steady attrition of established constitutional processes, that foreign policy has become subversive of the very ends it is meant to serve. Why after all do we engage in foreign relations if not for the purpose of securing certain values, including the preservation of our constitutional democracy? The values of democracy are in large part the processes of democracy -- the way in which we pass laws, the way in which we administer justice, the way in which government deals with individuals. When the exigencies of foreign policy are thought to necessitate the suspension of these processes, repeatedly and over a long period of time, such a foreign policy is not only inefficient but utterly irrational and self-defeating. I am willing to predict with reasonable confidence that, if democracy is destroyed in America in the lifetime of the present university generation, it will not be the work of the Russians, or of the Chinese, and certainly not of the Vietnamese Communists; the totalitarianism toward which we are heading will be a home grown product. Like the American major in Vietnam who found it necessary to "destroy Ben Tre in order to save it," we may find some day, without quite knowing when or how or why it happened, that we have destroyed our own constitutional democracy -- in order to save it.

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I used to puzzle over the question of how American democracy could be adapted to the kind of role we have come to play in the world. I think I now know the answer: it cannot be done. Congress can adopt palliative measures such as the Cooper-Church amendment or any of a number of possible bills designed to regulate the President's use of the armed forces, and these are all to the good. But they will not of themselves either stop the war, restore the Constitutional authority of Congress, or arrest the long term trend toward authoritarian government. That trend, I am now convinced, is irreversible as long as we continue to play the kind of role we are now playing in the world, as long as our course remains one of great power militarism. The real question is not whether we can adapt democracy to the kind of role we are now playing in the world -- I am sure that we cannot -- but whether we can devise a new foreign policy which will be compatible with our traditional values, a foreign policy which will give us security in our foreign relations without subverting democracy at home.

Tomorrow evening, in my talk to the Political Union, I will attempt to suggest some broad outlines for a new American foreign policy. In the remainder of my remarks tonight I would like to comment further on the decline of Congressional authority and the trend toward executive dictatorship in our foreign relations.

## II. The Decline of Congress

The distinguishing virtue of legislative bodies is neither wisdom nor virtue nor prescience. Individual members may sometimes possess these qualities, but no legislative body as such has ever been endowed with evangelical or inspirational qualities; no Congress has ever been thought to possess "charisma." The American Congress is indeed a slow-moving and sometimes inefficient body, widely criticized for procedures which are said to be antiquated and undemocratic. There is no doubt in the world that our Congress is less efficient than the legislatures of certain parliamentary democracies, and far less efficient than the sham legislatures of totalitarian states.

If efficiency were the sole criterion of a good legislature, there would be everything to be said for dismantling the Congress, or at least for revamping its procedures and introducing a system of strict party discipline. That is what many reformers say they want to do, in the apparent belief that decision is always better than delay and action better than inaction -- a dubious assumption indeed, rooted in a utopian view of human nature. To those of us who have developed an appreciation of the capacity of people in high places for doing stupid things, there is much to be said for institutional processes which compel people to think things over before plunging into action. The SST is a case in point; the decision of both houses of Congress last week to lay that costly white elephant to rest would not have been possible if Senator Proxmire had not led a group of us in a salutary filibuster last December. But for that extended debate, the SST would now be a going concern.

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I for one am not much distressed by the charge that Congress is not an up-to-date institution. In this age of the SST, the ABM, the MIRV, and the Indochina war, being "behind the times" may indeed be a mark of wisdom. And "efficiency," as that term is applied to legislatures, sounds very much to my ear like a euphemism for obedience to an Executive. I cannot emphasize too strongly my belief, that a legislative body's accomplishments consist as much in what it prevents as in what it enacts. As Justice Brandeis pointed out: "The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." 3

Executive incursions upon Congress's foreign policy powers have had three main results: First, the authority to initiate war, which the Constitution vested solely in Congress, has passed into the hands of the Executive. Second, the treaty power, which was meant to give the Senate final authority over significant foreign commitments, has been reduced to a near nullity, sometimes by resort to executive agreements and simple declarations, sometimes by the simple device of reinterpreting treaties in such a way as to impute to them meanings which were wholly unintended, if not explicitly disavowed, at the time they were contracted. Third, the "advise and consent" function has been so diminished that little or no cognizance is now taken of the Senate's counsel, while "consultation" is commonly used to refer to ceremonial briefings which are provided from time to time in order to acquaint Senators with decisions which have already been made. In the words of one distinguished historian, with reference both to public and Congressional opinion, "Presidents Johnson and Nixon have made almost a virtue of unresponsiveness."4

The gradual takeover by the Executive of the war and treaty powers of Congress is part of a broader process of expanding Presidential authority which is by no means confined to foreign relations. Indeed, the trend toward militarized, authoritarian government has already penetrated broad areas of our domestic life. The Justice Department and the Army itself have engaged in spying and surveillance of anyone and everyone, including Senators, who, according to the peculiar lights of these agencies, may be considered "subversive." Our economy has been distorted by the development of a permeating military-industrial-labor union-academic complex, built around the fact that violence has become our country's leading industry. I particularly regret the unhealthy relationship which has grown up between many academic institutions and the Department of Defense and other government agencies.

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3. Myers v. United States, 1926, 272 U.S. 293, Mr. Justice Brandeis dissenting.
  4. Professor Alpheus T. Mason in a statement before the Senate Foreign Relations Committee, March 25, 1971, "Constitutional Crisis in 1971: The Uncertain Continuance of Reason."

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Even when these arrangements are entirely without strings or prior conditions -- as I am inclined to believe they are for the most part -- they are intellectually disruptive and their thrust is anti-democratic. Lacking a use for poetry and philosophy, the Department of Defense and the CIA offer no funds for these disciplines; the Government is a patron only of the more lethal arts.

The only reliable cure for these evils is a basic change in our national outlook, including the adoption of a new foreign policy which will be compatible with rather than antithetical to our traditional democratic values. Until that change can be accomplished -- if it can -- our best defense against creeping authoritarianism is an assertive, independent legislature, supported as it must be by a responsible educated electorate. The virtues of Congress are inseparable from its faults; slow and unwieldy as it may be in accomplishing desirable reforms, Congress is equally unsuited to the task of depriving people of their liberties. If war and crisis should someday give rise to an aggressive, anti-libertarian Congressional majority, that majority would likely find itself hobbled by the Senate filibuster and the tortuous workings of the committee system.

The greatest single virtue of a strong legislature is not what it can do but what it can prevent. Incapable by reason of its size and diversity of imposing an authoritarianism of its own, the American Congress, with all its irrationalities, remains the strongest institutional barrier to Presidential dictatorship. But it can perform this vital service only as long as it is willing to exercise its legislative authority in foreign as well as domestic affairs, and only if it is willing to accept the responsibility for thwarting the Commander-in-Chief when it seems necessary, bearing in mind the words of Justice Holmes, that "We do not lose our right to condemn either measures or men because the country is at war."<sup>5</sup>

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5. Frohwerk v. U.S., 249 U.S. 204, 208 (1919).

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### III. The Cult of the Presidency

As long as the President's capacity to dominate foreign policy remained an unrealized potentiality, as was the case until the twentieth century, and as long as that power, once it did begin to take form, was exercised in a way that won the approval of progressive-minded scholars and politicians, criticism of the Presidential office was confined to a handful of conservative Senators and academics who were dismissed as reactionary mossbacks. Hardly anyone, for example, took serious notice in 1950 when Senator Watkins of Utah questioned the authority of President Truman to commit the country to war in Korea without consulting Congress, and said that, if he were President, he ". . . would have sent a message to the Congress of the United States setting forth the situation and asking for authority to go ahead and do whatever was necessary to protect the situation."<sup>6</sup> In retrospect, the so-called mossbacks seem like prescient constitutionalists.

With all due respect for the failures of judgment of recent Presidents, some rather fundamental defects seem to be inherent in the office itself, and in the electoral process as it has evolved in recent decades. Building on Madison's premise that "all men having power ought to be mistrusted," we are probably justified in extending our mistrust -- or at least a certain wariness -- toward any man who desires power so much as to be willing to do all the arduous things a man has to do to become President of the United States.

The qualities of a good candidate are not identical with those of a good leader. Indeed, an individual of perspective and sensitivity who might make an excellent President is hardly likely to have the taste for political rough and tumble that a successful candidate requires. The packaging, the image-making, the fraud, the huckstering, the extravagant, thorough-going irrationality of modern political campaigns, cannot fail to be distasteful to individuals of judgment and sensitivity. At the outset of our history as an independent republic, with a population of hardly more than five million, we were governed by men of distinction. Surely among a population of 200 million there must be individuals of the caliber of Washington, Adams, Jefferson and Madison. Wherever else they are, few indeed seem to have chosen politics as their profession.

Among the shortcomings of the Presidential office, the most important appears to be the unique capacity of the office to isolate and deceive its occupant. So, at least, writes George Reedy, who served as President Johnson's press secretary and special assistant, in one of the most thoughtful and disturbing books on the Presidency of recent years. Encased from the day he takes office in an atmosphere of privilege and deference that amounts to royalty, the President is steadily divested of a politician's primary requirement, the maintenance of contact with reality, so much so, in fact, that, in Reedy's view, ". . . the White House is an institution which dulls the sensitivity of political men and ultimately reduces them to bungling amateurs in their basic craft -- the art of politics."<sup>7</sup>

6. Congressional Record, 81st Cong., 2nd Sess., vol. 96, pt. 7, Senate, June 27, 1950, pp. 9229-9233.

7. George F. Reedy, The White House, 1966, pp. 14.



The essential cause of the difficulty is the isolation of the President at the apex of power. No one speaks to him unless spoken to; no one, as Reedy points out, ever invites him to "go soak his head;" no one in his presence ever addresses himself to anyone except the President, and always in terms of reverential respect. No one is his peer, certainly not his White House assistants, nor the Cabinet members who are his political servants, nor even Senators and Congressmen when they meet the President on his home ground. Even the most independent-minded Senator, says Reedy, ". . . enters cautiously, dressed in his Sunday best and with a respectful, almost pious, look on his face," because "The aura of reverence that surrounds the President when he is in the Mansion is so universal that the slightest hint of criticism automatically labels a man as a colossal lout."<sup>8</sup>

Perhaps the single most important difference between an American President and a British Prime Minister is that the latter is compelled to meet his critics face to face, giving him a lever on reality that the American President is denied. "Under the American system" as one political scientist, Professor Alexander Groth, points out, "the Executive is virtually prevented from engaging in public debate on policy by the institutional setting of his office; under the British system he is expected and, in fact, compelled to engage continually in it."<sup>9</sup> Every Thursday afternoon the Prime Minister is obliged to descend into the arena of the House of Commons where he has to answer questions, respond to criticisms, and endure whatever barbs and insults the Opposition chooses to throw at him. His appearance in the House is not a state occasion like the President's infrequent visits to the Congress, which are steeped in pomp and ceremony but usually quite lacking in political substance. The Prime Minister cannot barricade himself behind a phalanx of assistants and advisers; he is obliged to think and speak for himself. As Professor Groth points out, it is not the power to vote no confidence and compel the Prime Minister's resignation which gives the House of Commons its decisive influence, but rather its ability to compel the Prime Minister and his Cabinet colleagues continually to explain and justify their policies to an informed and critical body of colleagues. It is not 'confidence' in its technical sense that a British Prime Minister must retain but confidence in its ordinary sense -- confidence in his judgment, competence and responsibility.

The President, by contrast, is more nearly in the position of the British Monarch, except for the crucial fact that he has power and she does not. When the President speaks, it is always from a pedestal. His annual State of the Union message is seldom a serious analysis of the nation's problems and prospects; more commonly, it is a self-serving catalogue of the Administration's alleged triumphs, interlarded with a lot of vacuous eloquence about "driving dreams," or a "second American revolution" which turns out to be a plan for some bureaucratic reshuffling. On other occasions -- notably when his standing in the polls sinks alarmingly low -- the President is likely to use his near-monopoly of the television to speak "directly" to the American people; on these occasions, it is usually not a new policy that the President wishes to convey but a new "image" -- an image of honesty or strength or sincerity, or even an image of indifference to "images." The total effect of all this indirect and inauthentic sham "communication"

8. *Ibid.*, p. 80.

9. Alexander J. Groth, "Britain and America: Some Requisites for a Comparative Political Science Quarterly, June 1970, p. 218.

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is to defraud the people of one of their most basic rights  
and the President of one of his most basic needs: the  
knowledge of each other's thinking.

Many promising correctives have been proposed of late; they range from a number of excellent bills designed to regulate the President's use of the armed forces to my own proposal for restrictions on secrecy in the name of "executive privilege." But in the long run, even the most energetic and ingenious means of reasserting Congressional prerogative will of themselves prove insufficient for the preservation of constitutional government. As Tocqueville pointed out, war breeds dictatorship. I for one am fairly well convinced that neither constitutional government nor democratic freedoms can survive indefinitely in a country chronically at war as America has been for the last three decades. Sooner or later, war will lead to dictatorship. Important though it is for Congress to assert its prerogatives and to devise new means of enforcing them, the issue ultimately will turn on questions outside of the legislative process, on questions of the allocation of resources between domestic needs and foreign involvements, questions of our willingness, whenever possible, to rely on the United Nations rather than our own military power, questions having to do with the kind of country we want America to be and the kind of role we wish it to play in the world.

The worst single consequence for our society of this long era of crisis and war has been the steady undermining of the rule of law. From the White House to the university campuses legal inhibitions have been giving way to faith and fervor, to that terrible irrational certainty of one's own rightness which leads men to break through the barriers of civilized restraint. Outraged as they have had every right to be by dishonesty, deviousness, and lack of restraint on the part of people in high office, many of our young people have seen fit, most regrettably, to imitate rather than repudiate the example. Supposing that they, in their purity of motive and intent, could right the injustices wrought by unworthy leaders, they seem unwilling to recognize that it has not been conscious malice or greed or hunger for power that has led the leaders of this country to make the terrible mistakes that have been made in these unhappy times, but that very same quality of mind which many young people themselves exhibit -- a supreme, arrogant confidence in the rightness of their own opinions.

That has been the worst of it: the breakdown of law -- really not of law itself but the state of mind in which people value and respect law. We seem to be moving into an era of uninhibited conscience, casting aside the insights of Freud, and of the framers of the American Constitution: that nothing can more surely deceive a man than his own uninhibited conscience; that the human mind is limited and imperfect in its perceptions of morality; that law is the closest approximation of institutionalized morality of which a human community is capable.

The founders of our country understood these things, and that is why they mistrusted power. "Confidence," said Jefferson, "is everywhere the parent of despotism -- free government is founded in jealousy; . . . it is jealousy and not confidence which prescribes limited constitutions, to bind down those we are obliged to trust with power. . . . In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. . . ."10

To arrest and reverse the decline of democratic government in America, we are going to have to recover our mistrust of power -- in the Presidency and wherever else it is found.